THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 63/08

GIANFELICE PAPPALARDO Appellant

and

GARY HAU Respondent

Neutral citation: *Pappalardo v Hau* (63/08) [2009] ZASCA 160 (30 November 2009).

Coram: STREICHER, HEHER JJA, HURT, LEACH *et* GRIESEL AJJA

Heard: 5 NOVEMBER 2009

Delivered: 30 NOVEMBER 2009

Summary: Neighbour law ─ drainage of rainwater ─ rights and obligations of neighbouring owners in urban environment ─ whether lower owner obliged to accept rainwater flowing onto his property from higher lying neighbour ─ judgment in *Williams v Harris* 1998 (3) SA 970 (SCA) considered and discussed ─ lower owner only obliged to accept 'natural flow' ie flow across boundary which would have occurred before development of urban erven ─ higher owner seeking to enforce right obliged to prove what the 'natural flow' was.

ORDER

On appeal from: South Gauteng High Court (Horn J sitting as court of first instance).

1. The appeal is upheld with costs.
2. The order of the court below is set aside and the following order substituted therefor:

(a) The defendant is granted absolution from the instance.

(b) The plaintiff is ordered to pay the defendant's costs, including the costs of the expert witness Korsman.

JUDGMENT

HURT AJA (STREICHER, HEHER JJA, LEACH et GRIESEL AJA concurring):

[1] The respondent instituted action against the appellant in the South Gauteng High Court, seeking a declaratory order to the effect that the respondent was entitled to insert certain drainage pipes into a boundary wall erected by the appellant. The respondent's complaint was that the wall was acting as a dam to rainwater on the respondent's property, causing flooding of a sector of the property. The appellant's opposition to the claim was unsuccessful, Horn J granting a declarator in the terms sought. The appellant appeals against the judgment with the leave of the high court.

The Setting

[2] The appellant and the respondent own adjoining erven in a township development known as Waterford Estate in the municipal area of Sandton. Waterford Estate is an 'upmarket township' which was apparently established in about 1996. There is controlled access to the Estate, the streets are all macadamized and reticulated electricity, water, stormwater drainage and

sewerage systems have been installed in keeping with the customary requirements for modern township developments. The respondent's property, erf 945, lies to the south of the appellant's, which is erf 944. The properties both slope down from south to north so that erf 945 is at a higher level than erf 944, the total fall over each property being of the order of a metre. Each property is flanked on the east by a street called Calleto Crescent. The common boundary is the northern boundary of erf 945 and, accordingly, the southern one of erf 944. There is a fall of the order of 600mm from west to east in the vicinity of the common boundary. The area of erf 945 is approximately 800 square metres while that of erf 944 is about 700 square metres.

[3] It is common cause that when the parties acquired their respective properties, no building had taken place on the Waterford Estate. The appellant built on his property before the respondent. In addition to his residence, the appellant constructed a boundary wall along his common boundary with erf 945. This wall, to which I will refer simply as 'the boundary wall', was approximately 2 metres high and traversed the length of the common boundary from west to east. Some time after the appellant had completed building, and during the latter part of 2003, the respondent constructed his residence. As well as the house itself, he built walls on the western and eastern sides of erf 945 and embellished his side of the boundary wall with a series of decorative arches. In the space between his house and the northern boundary wall he built a swimming pool which was surrounded by paving and which occupied about a third of the total distance between the eastern and western boundaries. Judging from the scaled site plan of the property, I think it is safe to conclude that at least seventy percent of the site is covered by buildings, paving and the swimming pool. Cultivated gardens and lawns cover the remainder.

History

[4] During December 2003, the respondent noticed that rainwater was gathering in the north-western sector of his property and damming up against the boundary wall. The respondent discussed this problem with the appellant

and suggested that the boundary wall should be breached in some way to allow this rainwater to drain off onto the appellant's property. There was a conflict of fact, in the evidence, about what transpired during this discussion but, on 27 January 2004, the appellant's attorneys addressed a letter to the respondent, warning him that any attempt to breach or otherwise interfere with the integrity of the boundary wall for the purpose of discharging water onto erf 944 would be resisted. The appellant's contention was that the respondent's building operations had resulted in an increase in the flow of rainwater draining northwards off erf 945 and that the appellant was not obliged to accept or to deal with it. The respondent instituted action against the appellant in August 2004, claiming a declaratory order to the effect that the respondent was entitled to insert a series of drainage pipes into the base of the boundary wall at ground level and at sub-surface level to allow rainwater to flow from the respondent's property onto the appellant's. The respondent's contention was that the appellant, as the owner of the lower-lying property, was obliged to accept such water.[1] In his plea, the appellant denied that the water which the respondent sought to discharge onto his property would have flowed there naturally. He contended that considerations of practicality favoured an arrangement whereby the respondent discharged excess rainwater directly from erf 945 onto Calleto Crescent, referring in this regard to s 13(2) of the Sandton Town Planning Scheme, 1980 (to which I shall make detailed reference later).

[5] Having heard a fairly considerable amount of evidence (and, no doubt, argument) on the matter, the learned judge in the lower court stated his view of the law to be applied to this sort of situation in explicit and unequivocal terms:

'It is common cause that water will flow naturally from the [respondent's] property to the [appellant's] property. The [appellant] as the lower lying property owner is obliged to receive natural flowing water from the [respondent's] property – there can be no argument with that.

[1] The Particulars of Claim were equivocal in that they made reference to the requirements of the National Building Regulations as support for the specific declaratory relief sought. However, in his opening address at the trial, counsel for the respondent (plaintiff) made it clear that '. . . the plaintiff relies upon the common right that the lower lying property must receive the higher lying property's water.'

. . . .

In my view *Williams v Harris* 1998 (3) SA 970 (SCA) not only reiterated the common law principle that a lower lying owner must receive excess natural water from the higher lying owner, it also, by implication, underlined the principle that each case must be decided on its own facts. I also believe that plain common sense should play a role. In a case such as this where a person erects an obstruction which prevents the natural flow of water it is only fair to expect that such a person will take the necessary steps to avoid the accumulation of water caused by such obstruction.'

[6] If only the law was so uncomplicated! The basic principle is, indeed, captured in the *actio aquae pluviae arcendae*[2] of Roman times. But even in those ancient days it was found necessary to limit the lower owner's obligation to accept water flowing from his more elevated neighbour by excluding any increased flow arising as a result of 'artificial works' (ie other than those arising from ordinary agricultural activities) carried out on his property by the latter. As the Roman Law was adopted and modified into its Roman Dutch form, the limitations and qualifications to the basic rule had, perforce, to become more detailed and sophisticated for the purpose of making provision for such matters as urban development and altered living conditions. Writers such as Voet,[3] Grotius[4] and, later, Van Leeuwen[5] reported distinctions between rules for the rural ('rustic') and the urban environments. They referred to a number of servitudes that were customarily encountered as between property owners in rural areas and a number of different servitudes customarily encountered as between neighbouring owners in the urban setting. An examination of these servitudes makes it clear that they were necessary to regulate the relationship between owners of neighbouring properties insofar as coping with water flow and drainage were concerned and that they were used to vary or modify the common law rules which would otherwise apply. It also appears that, in various areas, probably the equivalent of the municipal areas of modern times, the 'basic rule' that the lower owner should accept the natural flow of water from the higher property had been

[2] Voet 39.3.2.
[3] 39.3.4.
[4] *The Jurisprudence of Holland* (Lee), II.34 and 35, especially II.34.15 and 16; and II.35.16 and 17.
[5] *Censura Forensis* 2.14.22.

modified.[6] Judging from the nature of the 'urban servitudes' discussed by Voet and Grotius, they had undoubtedly been formulated for the purely practical purpose of catering for the restricted space and concentrated building development that characterised (and still characterise) the urban environment. It is not the purpose of this judgment to consider these early common law rules, and the water servitudes which modified them, in any detail. It suffices for present purposes to say that by the time Roman Dutch Law became our Common Law, a distinction had already been drawn between the rights and obligations of neighbours in regard to the regulation of water flow between their properties in the rural context on the one hand and the urban context on the other. There were differences of opinion amongst the writers as to what properties were to be treated as 'rustic' (or 'rural') as opposed to 'urban'. But the proposed distinction was a subtle one, and it was generally accepted that the so-called 'urban servitudes' applied where dwellings were involved and the rustic ones applied to agricultural or larger tracts of cultivated property.[7]

[7] The reported decisions at the end of the nineteenth century and at the beginning of the twentieth mention this distinction but always as a qualification to the basic proposition that the lower owner is obliged to accept the natural flow of water draining from the property of the higher neighbour.[8]

[8] In *Bishop v Humphries* 1919 WLD 13, Gregorowski J adopted a practical approach to the problem of rainwater disposal in the urban context. He pointed out that the very nature of the development of the urban properties with which he was concerned would necessarily alter the natural flow of the water from the one property to another. He described, in some detail, the irreversible changes which development of an urban site would cause to the natural lie of the land, and, accordingly, to the 'natural flow' of water traversing it.[9]

'The water can no longer flow as it used to flow before buildings were erected and fences and other obstructions interposed. It would be perfectly impossible to restore

[6] Grotius *op cit* II.34.16; Van Leeuwen *loc cit.*
[7] There is a detailed and interesting discussion of this aspect in C W Decker: *Simon van Leeuwen's Commentaries on Roman Dutch Law* (2 ed) at 289 – 290 and 305-309.
[8] Eg *Austen Bros v Standard Diamond Mining Co Ltd* (1883) 1HCG 363, esp at 377-378.
[9] At pp 15-16.

the surface as it was before it was interfered with, and let the rainwater run off as it was accustomed to do. When it was in its natural state the surface being a slope the water never accumulated, but ran freely off westwards and northwards . . .. When buildings were put up extending over about half the surface of the stands with roofs collecting the water, the natural arrangement for the flow of the water was further disturbed and rendered impracticable. There would be more water to be got rid of than before and the water would have been more concentrated . . . the water coming from the roof comes in a concentrated form, hence the general doctrine has been that an owner cannot throw the water from his roof on to the adjoining neighbour's land, whatever the levels may be, unless he has a *servitus stillicidii recipiendi*. Every owner has to make some provision for the water coming from his roof and to provide against such water falling on his neighbour's land and causing damage and inconvenience there. Similarly he cannot let the water fall from his own roof on to his own land and claim the right to lead it through an aperture on to his neighbour's land. This would not be a natural flow of water, but it would be an artificial discharge operated by the hand of man.'

As a general proposition, the learned judge went on to say:[10]

'The fact is that when land is sold in small building plots, a state of things is created and contemplated which puts an end to a large extent to the natural servitude[11] which previously existed as regards the water which falls on the plots. Each owner puts up a building which covers a substantial part of the plot. He places an impervious surface over the naturally porous surface of the soil. He accumulates the water thereon. He alters the natural surface of the rest of the area of his plot by paving it or by locating temporary structures thereon or digging it up, and thereby annihilates the natural arrangement of the soil.'

And, finally, at the passage bridging pages 17 and 18:

'The applicant has altered all the old conditions existing on this stand while it was virgin soil and in a state of nature and it is quite impossible for him to throw a burden on the adjoining stand which is based on the assumption that his stand has preserved rights which he himself has put an end to by his own constructions on the property.'

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[10] At p 17.

[11] This term 'natural servitude' was used as a convenient manner of describing the common law rights and obligations of neighbours. It is not to be construed as a 'servitude in law'. See: *Retief v Louw* (1874) 4 SC 165 at 174-175.

[9] There are, in my view, two important features of the passages which I have quoted above. The first is the emphasis on the 'natural flow' as referring to the manner in which the water would have flowed, both as to quantity and locality, from the one property to the other over the land in its undisturbed state. It seems clear that, in coming to the conclusions to which I have referred earlier, Horn J, in the lower court, paid no heed to what may be called the 'original pattern of flow' from erf 945 to erf 944. Certainly none of the witnesses who testified before him had endeavoured to establish what this pattern of flow was or must have been, other than to say that the general direction of flow would have been from south to north across the common boundary.

[10] The second aspect is the particular emphasis placed on the consideration that the upper owner has no 'natural right', merely as upper owner, to concentrate the flow of water at a particular point or at particular points. Although the quantity of water thus discharged may be equal to that which would have crossed the boundary if the land had been undisturbed, the lower owner would nevertheless be called upon to cope with a pattern of flow which would not naturally have occurred. The upper owner can only impose such a burden on his neighbour if there exists in his favour an express servitude, whether acquired by registration, prescription or by agreement, entitling him to do so. Although Horn J considered the practicality of the installation of a system of drainage pipes in the boundary wall, he appears to have overlooked the fact that those very pipes would act as conduits for a concentrated flow of water at the points at which they emerged from the wall on the appellants side – an arrangement which the respondent had no right, without a servitude, to impose on the appellant.

[11] *Bishop* was followed in 1940 by Millin J in *Green v Borstel* 1940 (2) PH M 89. The facts of that case were on all fours with those now under consideration. The properties involved were in the urban area of Orange Grove, Johannesburg. The owner of the lower property built a concrete wall on his boundary to prevent stormwater flowing onto his property from the more elevated property of his neighbour. The latter sought an order

compelling the lower owner to demolish the wall, contending that by constructing it the lower owner had unlawfully obstructed the natural flow of water from the upper property. Millin J held that when a township is created, the division of the ground into small plots and the erection of structures on them would 'cause the storm water to flow entirely differently from the way in which it would have flowed originally'. He dismissed the application because the upper owner had failed to prove 'that the water whose flow was obstructed by the wall was water which would have flowed on to the [lower owner's] land even if no buildings had been erected, and the original contours of the ground not interfered with.'

[12] A similar approach was adopted by Beadle J in *Barklie v Bridle* 1956 (2) SA 103 (SR). He, too, referred to *Bishop* with approval, although he mentioned a possibility that the law may have been 'too broadly' stated in that case.[12] At page 109 he said:

'In my view, if the owner of an urban tenement, by the lawful development of his stand, increases, concentrates and alters the natural flow of water from his stand he is not entitled to discharge that water on to his lower neighbour's stand at a point which may be most convenient to himself but most inconvenient to his lower neighbour. He must take reasonable steps to ensure that by the discharge of that water no injury is done to his lower neighbour; and if, by use of reasonable measures, he can discharge that water on to the adjoining street so that the water may be harmlessly drained down that street, then I consider he should do so.'

[13] *Barklie* was the subject of comment by Prof. Scholtens in the 1956 *Annual Survey of South African Law.*[13] The learned professor expressed the view that the decision was correct but that it could have been arrived at more directly by reference to Grotius.[14]

'Direct authority is provided by Grotius, 2.34.16, who says with regard to urban tenements (Lee's translation):

"For by the common law everyone must lead his water on his own land, or over his own land out to the street".

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[12] It is not clear, from the report, in what respects it may have been suggested that the decision of Gregorowski J was possibly 'too broad'.
[13] At pp 134-136.
[14] *Op cit* footnote 4, above.

This rule exactly covers the facts of the present case. It is submitted that the decision in *Bishop's* case correctly states the Roman-Dutch law although a qualification is needed where the natural situation makes it impossible to discharge rainwater on to a street or road.'

[14] That brings me to the decision of this court in *Williams v Harris* 1998 (3) SA 970 (SCA) to which Horn J referred in his judgment and on which counsel for the respondent relied heavily in support of his argument before us. The decision is the first, as far as I am aware, in which this court was called upon to deal with a 'water dispute' between residential neighbours in the urban context. Coetzee J, who had given the judgment in the court of first instance,[15] had, on the authority of *Bishop*, *Green* and *Barklie*, expressed the view that the very creation of a township resulted in an irreversible alteration of the 'natural land' and that there could be no application of the principle that higher landowners were entitled as of right to discharge rainwater onto the property of their lower neighbours. In coming to this conclusion Coetzee J had referred, also, to Grotius 2.34.16 and to the discussion of *Barklie* by Prof. Scholtens in the 1956 *Annual Survey*. At the commencement of his judgment on appeal, Marais JA emphasised[16] that he felt constrained to embark on an analysis of the common law, without having had the benefit of full argument. The necessity for doing this, he said, was to decide whether there was substance, in law, in the dispute on the papers as to whether the lower property owner was obliged to tolerate any flow of water across the common

[15] *Sub nom Harris v Williams* 1998 (2) SA 263 (W).
[16] At pp 981D and 984B-C.

boundary onto her property.[17]

[15] After a detailed investigation of the reported cases and comments by certain writers, Marais JA concluded that the right of the owner of higher lying property to discharge the 'natural flow' of rainwater onto the property of his lower lying neighbour still exists even in urban environments. In coming to this conclusion the learned judge pointed out that this right was not denied in *Bishop, Green* and *Barklie*, but that in each of those cases it had been held as a fact that the topography of the ground had been interfered with in the course of development of the respective stands and that there was no proof that the water which formed the subject matter of the dispute was flowing in its 'natural pattern'.

[16] In coming to this conclusion Marais JA made specific reference to the comment on *Barklie* by Prof. Scholtens and the reference to Grotius 2.34.16. In this connection he said:[18]

'I explained earlier in this judgment why I do not consider that *Bishop's* case purports to support the notion that even rainwater which would have flowed naturally on to a lower owner's property must be prevented from doing so by the upper owner. I think it is reasonably clear that Grotius is not speaking of naturally flowing rainwater but of water (whether it be rainwater or not) which has been artificially collected by the upper owner and which is sought to be discharged on to the lower owner's property. Such an interpretation harmonises the passage with another passage in Grotius, namely 2.35.17 in which he said:

"By common law anyone may let his water flow in its natural course, from which comes the old proverb 'if water hurts you, you may turn it away'."[19]

(*Lee's* translation). The competing interpretation would result in attributing a self-contradiction to Grotius – a highly unlikely postulate. I am aware that the first passage cited occurs under the rubric of urban servitudes and the second under that

[17] The learned judge had pointed out that there were a number of disputes of fact on the papers and that it was necessary to decide whether the view of the judge *a quo* on this aspect had been correct for the purpose of deciding whether the dispute concerning the quantity of water involved should be one of the issues referred back to the lower court for the hearing of oral evidence.

[18] At p 983G-984B.

[19] I must confess that the link between the principle and the proverb escapes me. The original version in Dutch is 'dien water deert die water keert'. Perhaps something was lost in the translation, but it is of no moment as far as this judgment is concerned.

of rustic servitudes but I do not think that Grotius was confining his observation in the latter to rural situations. If it was indeed so that a fundamentally different principle applied in urban situations I would have expected Grotius to pointedly draw attention to the contrast.'

I am unable to agree with Marais JA's reason for interpreting and qualifying the passage as he did. It is clear that the whole context of chapters 34 and 35 of book 2 is one in which the learned writer was stating why the customary servitudes had become necessary – ie that they were aimed at alleviating the burdens thrust on owners by the common law.

[17] As I understand the issues formulated by Marais JA[20] for reference to oral evidence before the court a quo, those in respect of the water dispute contemplate the possibility that the court hearing the evidence might effectively order the lower owner to accept the 'historical natural flow' and no more. Since, on the basis of the decisions in *Bishop, Green* and *Barklie* the determination of the 'natural flow' in the urban context is rendered virtually impossible by the very establishment of a modern urban township, it is difficult to conceive of the form which a court order could take for the fair enforcement of the higher owner's right in this regard. Plainly the order could not relate to the quantity of 'natural flow' only, for immediately the cogent objections to concentration of the theoretical natural flow mentioned in *Bishop*[21] and *Barklie*[22] would apply. Furthermore, proof of the natural flow after development has taken place would almost invariably be a very complicated (and prohibitively costly for that reason) exercise.

[18] There is accordingly much to be said for the adoption, as correctly reflecting our common law, of the judgment in *Bishop* with the qualification suggested by Prof Scholtens in the passage quoted in para13. However it is not necessary in this case, for reasons which follow, to go that far.

[19] It is common to all the decisions which I have discussed, even that in *Williams,* that at best for the upper owner, his right only extends so far as to

[20] At p 984.
[21] At pp 17 and 18.
[22] At p 109.

require the lower neighbour to accept the 'natural flow'. Where, as in this case, the upper owner sues to enforce this right, it is incumbent upon him, at very least, to prove the amount of water constituting the 'natural flow'.[23] In this regard counsel for the respondent tried to persuade us that the onus was on the appellant, who was responsible for causing the problem on the respondent's property, to establish the amount of the natural flow as the upper limit of his obligation. But there is clearly no substance in this contention. It flies in the face of the decision in *Green* and there is no suggestion whatsoever in *Williams* that the approach of Millin J might be incorrect in this respect. There was no attempt by the respondent, in the course of the trial, to establish what the amount of the 'natural flow' was. Indeed, it would probably have been a task beyond the capabilities of the expert witness called by the respondent. In the result, the facts being on all fours with those in *Green,* the respondent's argument must fail for the same reason as the plaintiff's did in that case.

[20] There remain two further aspects on which I think it is necessary to comment. The first relates to the effect of s 13(2) of the Sandton Town Planning Scheme on the rights and obligations of the parties. It appears to have been common cause that the provisions of the Scheme applied to the properties in Waterford Estate. Section 13(2) reads as follows:

'Where, in the opinion of the local authority, it is impracticable for stormwater to be drained from higher lying erven direct to a public street, the owner of the lower[24] erf shall be obliged to accept and/or permit the passage over the erf of such stormwater:

Provided that the owner of any higher lying erf, the stormwater from which is discharged over any lower lying erf, shall be liable to pay a proportionate share of the cost of any pipeline or drain which the owner of such lower lying erf may find necessary to lay in order to drain stormwater from his property.'

It is of interest to note the similarity between these provisions and those suggested by Prof Scholtens in the *Annual Survey* article. But apart from that, it seems clear that what is clearly implied by the subsection is that, where it is

[23] I stress that this would be the very minimum which the owner would have to establish – his onus would ordinarily be much more complicated than this.

[24] The copy of the extract of the Scheme put up as an exhibit omitted the word 'lower', but the extract quoted by Horn J in his judgment, and the references in the Heads of Argument to the section both include this word. The section would be meaningless without it and there can be little doubt that the section in fact reads as quoted above.

practicable to drain stormwater onto the street, the owner must do so. However, Horn J dealt with this contention in the following terms:

'I fail to see how this provision can be applied to the facts of this matter. It was after all the [appellant] who raised this aspect and, if anything, it was for the [appellant], should he have felt that the proviso applied, to prove the applicability of the town planning provisions to this matter.'

I have premised my reference to the Town Planning Scheme on the basis that it was common cause between the parties that s 13(2) applied. If it did not, then *cadit quaestio*. In argument, counsel for the respondent did not (as I understood him at least) try to contend that the Scheme was not applicable. What he submitted was that the appellant bore the onus of proving that the local authority did not hold the opinion referred to in the subsection. This is an unduly contorted way of looking at the provision. As I have already indicated, the subsection is based upon an assumption that water will be drained onto the street. An owner wishing to drain it through some other course, for instance his neighbour's property, must obtain the opinion of the local authority that there is no other practical means of coping with the stormwater before he acquires the right to do so. There is accordingly no substance in the assertion that, in the absence of any evidence of the local authority's view on the matter the respondent's contention must fail. In fact it was common cause between the experts for both sides that the respondent could construct a sump in the north-west sector of his property and drain the excess water from there to Calleto Crescent. The dispute about this arrangement was focused on its cost compared to the cost of inserting pipes in the boundary wall and draining the water to the street along the appellant's southern boundary. But the fact that the latter arrangement would have been cheaper than the former hardly assists the respondent. The issue is not one of expense but of 'practicability'. I should mention that the experts agreed that if the respondent had installed the sump and necessary piping to Calleto Crescent before building his swimming pool and paving its surrounds, the cost of such installation would have been far less. In my view the provisions of the Town Planning Scheme also operate in favour of the appellant.

[21] The last aspect concerns the case which the respondent attempted to develop concerning alleged non-compliance by the appellant with the provisions of the National Building Regulations and their subsidiary provisions in the construction of the wall. Respondent and his expert witness referred to certain regulations relating to the provision of drainage through certain walls. There was a dispute between the experts as to whether the appellant was, in the circumstances in which he constructed the boundary wall before the respondent started to develop his property, even obliged to provide drainage holes in it. The lower court did not consider the question whether on the basis of these regulations alone, it should exercise its discretion to grant respondent relief. Nor do I think it would have been appropriate for the court, especially on the limited evidence before it, to exercise such a discretion in the respondent's favour. This appeal will certainly not operate as a bar to the respondent approaching the local authority to complain about any transgression of the Regulations of which the appellant may have been guilty and the regulations and the by-laws will provide the remedy if the respondent's allegations are well founded.

[22] In the result the appeal must succeed. I make the following order:

1. The appeal is upheld with costs.

2. The order of the court below is set aside and the following order substituted therefor:

(a) The defendant is granted absolution from the instance.

(b) The plaintiff is ordered to pay the defendant’s costs, including the costs of the expert witness Korsman.

N V HURT
ACTING JUDGE OF APPEAL

Appearances:

Counsel for Appellant:	A Bester Instructed by Kuilman Mundell & Arlow c/o Matthew Kerr-Phillips, Johannesburg Webbers, Bloemfontein
Counsel for Respondent:	A van der Merwe Instructed by Vos Attorneys c/o Whalley Van Der Lith, Johannesburg Symington & De Kok, Bloemfontein